

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

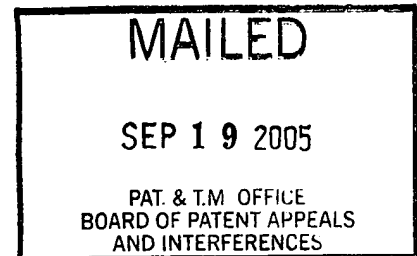
UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte JOSEPH E. COURY and JOHN S. MASSAAD

Appeal No. 2005-0691
Application No. 09/691,713

HEARD: July 14, 2005



Before FRANKFORT, PATE, and NASE, Administrative Patent Judges.
PATE, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1, 3-11 and 14-20. The rejection of the other claims remaining in the application, claims 21-29, was not appealed.

The claimed invention is directed to a personal gas supply for delivering respiration gas to a patient. The gas supply includes an alarm.

The claimed subject matter may be further understood with reference to the appealed claims appended to appellants' brief.

The references of record relied upon by the examiner as evidence of anticipation and obviousness are:

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|---------|-----------|---------------|
| Bird | 5,165,398 | Nov. 24, 1999 |
| Connell | 6,098,617 | Aug. 8, 2000 |

Claims 1 and 3-7 stand rejected under 35 U.S.C. § 102(b) as anticipated by Bird.

Claims 8-11 and 13-20 stand rejected under 35 U.S.C. § 103 as unpatentable over Bird in view of Connell.

For the full details of these rejections, reference is made to the examiner's answer. For appellants' response thereto, reference is made to the appeal brief and reply brief respectively.

OPINION

We have carefully reviewed the rejections on appeal in light of the arguments of the appellants and the examiner. As a result of this review, we have reached the determination that claims 1 and 3-7 are anticipated by the Bird reference and claims 11 and 13-17 are prima facie obvious in view of the Bird reference when modified by Connell. Therefore, the rejections of claims 1, 3-7, 11 and 13-17 are affirmed. The rejections of claims 8-10 and 18-20 are reversed. Our reasons follow.

The following are our findings of fact with respect to the scope and content of the prior art and the differences between the prior art and the claimed subject matter. Bird discloses a personal gas supply delivery system with a moisturizing vessel 182. The

vessel has a first opening (unnumbered) for receiving influent gas via line 181. The vessel has a second opening (unnumbered) for effluent gas which flows out of the vessel via first conduit 183. First conduit 183 is connected to a gas flow alarm via a tee 166 and a sampling conduit 172. A second conduit 167 is in fluid communication with the first conduit 183 and is connected to the gas flow alarm by the tee 166 and sampling conduit 172. The second conduit of Bird is described as a patient adapter in the form of an endotracheal tube. The endotracheal tube 167 of Bird is depicted as quite short with an inflatable sealing cuff close to the tee 166. Thus, it is our finding that the second conduit of Bird is of a short extent. Bird further discloses an audible alarm 287 and LED indicators 292, 293, 294, and 296 which give a visual alarm. A reset pushbutton 298 is also provided. Bird differs from the claimed invention of claim 11 in that it does not show a nasal cannula.

With respect to the anticipation rejection of claim 1, we note that appellants have not argued that Bird does not have the structure called for in the claim. Instead, appellants argue that the gas flow alarm is not proximate to the recipient when the gas supply is in use. This is merely a use limitation and cannot impart patentability, inasmuch as Bird teaches the structure called for in the independent claim 1. Additionally, it is apparent that appellants have made the unwarranted assumption that second conduit 167 shown in Bird is of undue length. We find nothing in the reference to suggest that the length is of great extent or that the patient would not be proximate

the respirator. Accordingly, it is our finding that claim 1 lacks novelty over the disclosed Bird gas supply system.

We note appellants' argument that Bird does not disclose a nasal cannula. Such a cannula is not specified in appellants' claim 1.

As previously noted, Bird discloses an alarm that is activated in response to a predetermined setting being sensed. The alarm can be audible or visual. Claims 3-7 also lack novelty.

Turning to the obviousness rejection, it is our finding that Connell discloses an improved cannula for the delivery of respiratory gas to a patient. Several embodiments are shown, all to be inserted as nasopharyngeal airways similar to the prior art airway 16 shown in Figure 1B. Figures 4 and 5 show embodiments comprised of a single tube 50 with a longitudinal septum 54 or two tubular lumens 72 and 74, respectively. Giving the claim terminology of "binary nasal cannula" its broadest reasonable interpretation, we agree with the examiner that the embodiments of Figure 4 and 5 can be considered as binary nasal cannula. We note that Connell recommends the replacement of the prior art endotracheal device (see Figure 1A) with his invention. This provides express, written suggestion for the combination of the Bird and Connell references.

Consequently we will sustain the obviousness rejection of claims 11 and 13-17.

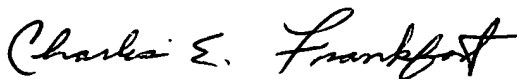
Regarding claims 8 and 18, neither Bird nor Connell has any disclosure respecting the alarm reset and test features being flush or recessed with respect to the

cabinet surface. Regarding claims 9, 10, 19 and 20, the applied prior art also has no disclosure of a transmitter or radio signal. Notwithstanding the examiner's arguments, these obviousness rejections cannot be sustained without evidence.

In summary, the rejections of claims 1, 3-7, 11, 13-17 are affirmed. The rejections of claim 8-10 and 18-20 are reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART



CHARLES E. FRANKFORT
Administrative Patent Judge



WILLIAM F. PATE, III
Administrative Patent Judge



JEFFREY V. NASE
Administrative Patent Judge

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